

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Aug 07, 2020**

SEAN F. MCAVOY, CLERK

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF WASHINGTON**

ANDREW V.,<sup>1</sup>

Plaintiff,

vs.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:19-cv-00392-MKD

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 12, 14

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 12, 14. The parties consented to proceed before a magistrate judge. ECF No. 4. The Court, having reviewed the administrative record and the parties' briefing,

<sup>1</sup> To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

ORDER - 1

1 is fully informed. For the reasons discussed below, the Court grants Plaintiff's  
2 motion, ECF No. 12, and denies Defendant's motion, ECF No. 14.

### 3 JURISDICTION

4 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

### 5 STANDARD OF REVIEW

6 A district court's review of a final decision of the Commissioner of Social  
7 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
8 limited; the Commissioner's decision will be disturbed "only if it is not supported  
9 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
10 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a  
11 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159  
12 (quotation and citation omitted). Stated differently, substantial evidence equates to  
13 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and  
14 citation omitted). In determining whether the standard has been satisfied, a  
15 reviewing court must consider the entire record as a whole rather than searching  
16 for supporting evidence in isolation. *Id.*

17 In reviewing a denial of benefits, a district court may not substitute its  
18 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,  
19 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one  
20 rational interpretation, [the court] must uphold the ALJ's findings if they are

1 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674  
2 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an  
3 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless  
4 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”  
5 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s  
6 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*  
7 *Sanders*, 556 U.S. 396, 409-10 (2009).

#### 8 **FIVE-STEP EVALUATION PROCESS**

9 A claimant must satisfy two conditions to be considered “disabled” within  
10 the meaning of the Social Security Act. First, the claimant must be “unable to  
11 engage in any substantial gainful activity by reason of any medically determinable  
12 physical or mental impairment which can be expected to result in death or which  
13 has lasted or can be expected to last for a continuous period of not less than twelve  
14 months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment must be  
15 “of such severity that he is not only unable to do his previous work[,] but cannot,  
16 considering his age, education, and work experience, engage in any other kind of  
17 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
18 423(d)(2)(A).

19 The Commissioner has established a five-step sequential analysis to  
20 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §

1 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's  
2 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in  
3 "substantial gainful activity," the Commissioner must find that the claimant is not  
4 disabled. 20 C.F.R. § 404.1520(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis  
6 proceeds to step two. At this step, the Commissioner considers the severity of the  
7 claimant's impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers  
8 from "any impairment or combination of impairments which significantly limits  
9 [his or her] physical or mental ability to do basic work activities," the analysis  
10 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant's impairment  
11 does not satisfy this severity threshold, however, the Commissioner must find that  
12 the claimant is not disabled. 20 C.F.R. § 404.1520(c).

13 At step three, the Commissioner compares the claimant's impairment to  
14 severe impairments recognized by the Commissioner to be so severe as to preclude  
15 a person from engaging in substantial gainful activity. 20 C.F.R. §  
16 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the  
17 enumerated impairments, the Commissioner must find the claimant disabled and  
18 award benefits. 20 C.F.R. § 404.1520(d).

19 If the severity of the claimant's impairment does not meet or exceed the  
20 severity of the enumerated impairments, the Commissioner must pause to assess

1 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
2 defined generally as the claimant's ability to perform physical and mental work  
3 activities on a sustained basis despite his or her limitations, 20 C.F.R. §  
4 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

5 At step four, the Commissioner considers whether, in view of the claimant's  
6 RFC, the claimant is capable of performing work that he or she has performed in  
7 the past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is  
8 capable of performing past relevant work, the Commissioner must find that the  
9 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of  
10 performing such work, the analysis proceeds to step five.

11 At step five, the Commissioner considers whether, in view of the claimant's  
12 RFC, the claimant is capable of performing other work in the national economy.  
13 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner  
14 must also consider vocational factors such as the claimant's age, education, and  
15 past work experience. *Id.* If the claimant is capable of adjusting to other work, the  
16 Commissioner must find that the claimant is not disabled. 20 C.F.R. §  
17 404.1520(g)(1). If the claimant is not capable of adjusting to other work, the  
18 analysis concludes with a finding that the claimant is disabled and is therefore  
19 entitled to benefits. *Id.*

1 The claimant bears the burden of proof at steps one through four above.  
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
3 step five, the burden shifts to the Commissioner to establish that 1) the claimant is  
4 capable of performing other work; and 2) such work “exists in significant numbers  
5 in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d  
6 386, 389 (9th Cir. 2012).

### 7 **DISABLED WIDOWER’S BENEFITS**

8 In order to be entitled to disabled widower’s benefits, a claimant must  
9 establish, among other things, that he is at least 50 years of age, unmarried unless  
10 an exception set forth in 20 C.F.R. § 404.335(e) applies, and a widower of a wage  
11 earner who died fully insured. 20 C.F.R. § 404.335. He must be found disabled no  
12 later than seven years after the spouse’s death. *See* 20 C.F.R. § 404.335(c). He  
13 must establish that he has physical or mental impairments that result in disability as  
14 defined in 42 C.F.R. § 404.1505. *Id.* The definition of disability for disabled  
15 widower’s benefits is the same as for the standard disability case and the five-step  
16 sequential evaluation process is applicable to disabled widower’s benefits cases.  
17 *See* 20 C.F.R. §§ 404.1505(a); 404.1520(a)(4)(i)–(v).

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**ALJ'S FINDINGS**

On February 5, 2016, Plaintiff applied for disabled widower's benefits, alleging a disability onset date of January 15, 2008.<sup>2</sup> Tr. 65-66, 173-74. The application was denied initially and on reconsideration. Tr. 88-94, 97-102. Plaintiff requested an amended alleged onset date of October 1, 2014. Tr. 15, 272. Plaintiff appeared before an administrative law judge (ALJ) on January 19, 2018. Tr. 27-59. On October 3, 2018, the ALJ denied Plaintiff's claim. Tr. 12-26.

At step one of the sequential evaluation process, the ALJ found that Plaintiff had not engaged in substantial gainful activity since October 1, 2014. Tr. 17. At step two, the ALJ found that Plaintiff had the following severe impairments: mild degenerative disc disease, depression, and anxiety disorder/panic disorder. Tr. 17.

At step three, the ALJ found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of a listed impairment. Tr. 18. The ALJ then concluded that Plaintiff had the RFC to perform light work with the following limitations:

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<sup>2</sup> The ALJ noted that, per representative correspondence, Plaintiff requested an amended alleged onset date of October 1, 2014. Tr. 15, 272.

1 [Plaintiff] is limited to simple, repetitive tasks and incidental contact  
2 with the general public but not as a part of job tasks. [Plaintiff] can  
3 have occasional interaction with coworkers and supervisors. No  
4 tandem work with coworkers, no production pace rate work.

5 Tr. 19.

6 At step four, the ALJ found that Plaintiff had no past relevant work. Tr. 21.

7 At step five, the ALJ found that, considering Plaintiff's age, education, work  
8 experience, RFC, and testimony from the vocational expert, there were jobs that  
9 existed in significant numbers in the national economy that Plaintiff could perform,  
10 such as mailroom clerk and laundry sorter. Tr. 21-22. Therefore, the ALJ  
11 concluded that Plaintiff was not under a disability, as defined in the Social Security  
12 Act, from October 1, 2014, through December 31, 2015.<sup>3</sup> Tr. 22.

13 On September 20, 2019, the Appeals Council denied review of the ALJ's  
14 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for  
15 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).  
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18 <sup>3</sup> The ALJ's reference to the relevant period beginning in December 2015 and  
19 ending in December 2022 on one page of the decision appears to be a  
20 typographical error. Tr. 16.



1 **ISSUES**

2 Plaintiff seeks judicial review of the Commissioner's final decision denying  
3 his application for disabled widower's benefits under Title II of the Social Security  
4 Act. Plaintiff raises the following issues for review:

- 5 1. Whether the ALJ properly evaluated Plaintiff's symptom claims;  
6 2. Whether the ALJ properly evaluated lay witness evidence;  
7 3. Whether the ALJ properly developed the record;<sup>4</sup>  
8 4. Whether the ALJ conducted a proper step-three analysis; and  
9 5. Whether the ALJ conducted a proper step-five analysis.

10 ECF No. 12 at 2.

11 **DISCUSSION**

12 **A. Plaintiff's Symptom Claims**

13 Plaintiff faults the ALJ for failing to rely on clear and convincing reasons in  
14 discrediting his mental health symptom claims.<sup>5</sup> ECF No. 12 at 14-19. An ALJ

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16 <sup>4</sup> Plaintiff combined the arguments regarding the ALJ's step three analysis and the  
17 ALJ's development of the record. For clarity, the Court addresses the arguments  
18 separately.

19 <sup>5</sup> Plaintiff does not challenge any of the ALJ's findings related to his physical  
20 symptom claims. *See* ECF Nos. 12, 15.

1 engages in a two-step analysis to determine whether to discount a claimant's  
2 testimony regarding subjective symptoms. Social Security Ruling (SSR) 16–3p,  
3 2016 WL 1119029, at \*2. “First, the ALJ must determine whether there is  
4 objective medical evidence of an underlying impairment which could reasonably  
5 be expected to produce the pain or other symptoms alleged.” *Molina*, 674 F.3d at  
6 1112 (quotation marks omitted). “The claimant is not required to show that [the  
7 claimant’s] impairment could reasonably be expected to cause the severity of the  
8 symptom [the claimant] has alleged; [the claimant] need only show that it could  
9 reasonably have caused some degree of the symptom.” *Vasquez v. Astrue*, 572  
10 F.3d 586, 591 (9th Cir. 2009).

11 Second, “[i]f the claimant meets the first test and there is no evidence of  
12 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
13 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
14 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations  
15 omitted). General findings are insufficient; rather, the ALJ must identify what  
16 symptom claims are being discounted and what evidence undermines these claims.  
17 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th 1996); *Thomas v. Barnhart*,  
18 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why it  
19 discounted claimant’s symptom claims)). “The clear and convincing [evidence]  
20 standard is the most demanding required in Social Security cases.” *Garrison v.*

1 *Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec.*  
2 *Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

3 Factors to be considered in evaluating the intensity, persistence, and limiting  
4 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,  
5 duration, frequency, and intensity of pain or other symptoms; 3) factors that  
6 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and  
7 side effects of any medication an individual takes or has taken to alleviate pain or  
8 other symptoms; 5) treatment, other than medication, an individual receives or has  
9 received for relief of pain or other symptoms; 6) any measures other than treatment  
10 an individual uses or has used to relieve pain or other symptoms; and 7) any other  
11 factors concerning an individual’s functional limitations and restrictions due to  
12 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at \*7; 20 C.F.R. §  
13 404.1529(c). The ALJ is instructed to “consider all of the evidence in an  
14 individual’s record,” to “determine how symptoms limit ability to perform work-  
15 related activities.” SSR 16-3p, 2016 WL 1119029, at \*2.

16 The ALJ found that Plaintiff’s medically determinable impairments could  
17 reasonably be expected to cause the alleged symptoms, but that Plaintiff’s  
18 statements concerning the intensity, persistence, and limiting effects of his  
19 symptoms were not entirely consistent with the evidence. Tr. 20.

1           *1. Inconsistent with Objective Medical Evidence*

2           The ALJ found that Plaintiff's symptom complaints were inconsistent with  
3 the objective medical evidence. Tr. 20. An ALJ may not discredit a claimant's  
4 symptom testimony and deny benefits solely because the degree of the symptoms  
5 alleged is not supported by objective medical evidence. *Rollins v. Massanari*, 261  
6 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir.  
7 1991). However, the medical evidence is a relevant factor in determining the  
8 severity of a claimant's pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20  
9 C.F.R. § 404.1529(c)(2).

10          The ALJ found that the objective evidence in the record failed to support  
11 Plaintiff's mental health symptom claims. Tr. 20; *see, e.g.*, Tr. 421 (November  
12 2014: records showed Plaintiff was grieving the loss of his mother; he had a  
13 depressed and anxious mood from such a close personal loss; he reported anxiety  
14 symptoms of poor sleep and increased appetite; he displayed a normal appearance,  
15 normal psychomotor activity, a full range affect, and good eye contact; his thought  
16 processes and content were logical, and he denied suicidal thoughts); Tr. 422-24  
17 (December 2014: Plaintiff reported being very involved in his father's health care;

1 he reported an increase in “good days” with the use of medications<sup>6</sup>); Tr. 425-26  
2 (February 2015: Plaintiff reported ongoing low mood; he was able to make travel  
3 arrangements and negotiate family conflicts relating to the scattering of his  
4 mother’s ashes); Tr. 427-28 (March 2015: Plaintiff experienced an exacerbation of  
5 symptoms, but “has started to bike and get outside some. He will start shooting  
6 soon”); Tr. 429 (April 2015: Plaintiff reported improved mood, feeling positive  
7 and hopeful, better energy, and taking more action; he retained an anxious mood  
8 but otherwise displayed a full affect, good eye contact, logical thought processes  
9 and content, and normal appearance); Tr. 431-32 (October 2015: Plaintiff  
10 continued to both consider and engage in more social activities including biking  
11 and competitive shooting, using coping mechanisms when his anxiety flared). The  
12 ALJ noted that Plaintiff testified he was depressed and anxious during the time  
13 period at issue, but determined his testimony indicated that any increase or  
14 significant exacerbations of symptoms occurred after the time period at issue. Tr.  
15 20. The ALJ indicated that Plaintiff’s mental status examinations were within  
16 normal limits, except for his mood, and these findings combined with Plaintiff’s

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19 <sup>6</sup> The treatment notes cited by the ALJ indicate Plaintiff “states that he had one  
20 good day which is better than nothing.” Tr. 423.

1 activities and “adequate” progress in therapy, indicated he was capable of  
2 functioning within the limitations set forth by the RFC. *Id.*

3       However, the ALJ failed to identify what in Plaintiff’s symptom testimony  
4 was inconsistent with the evidence or to explain how the evidence was  
5 inconsistent. Here, the ALJ summarized Plaintiff’s symptom claims by generally  
6 stating that Plaintiff alleged an inability to sustain basic work activities on a regular  
7 and continuing basis because of his impairments, and he indicated in his function  
8 report that his symptoms affected his ability to function. Tr. 20 (citing Tr. 221-28).  
9 The ALJ then summarized the medical evidence. Tr. 20. Indeed, the ALJ’s  
10 reasoning is unclear because some of the evidence identified by the ALJ could  
11 reasonably support Plaintiff’s symptom allegations. *See, e.g.*, Tr. 421 (November  
12 2014: although Plaintiff’s mental status examination was within normal limits  
13 except for quiet speech and depressed and anxious mood, Plaintiff’s treatment  
14 provider noted that he was experiencing low energy along with excessive anxiety,  
15 he felt very tense and could not get rid of the feeling, he was trying to alleviate this  
16 feeling by exercising but “it doesn’t help much,” his sleep was disturbed by his  
17 anxiety, and he did not feel rested); Tr. 424 (December 2014: Plaintiff’s treatment  
18 provider, although noting that he was very involved in his father’s medical care,  
19 also reported that Plaintiff “[t]alked about his need to run away from everything  
20 and have a break”); Tr. 425-26 (February 2015: although Plaintiff’s mental status

1 examination was within normal limits except for a depressed and anxious mood,  
2 Plaintiff reported that his mood remained low and he continued to be very lonely,  
3 and his treatment provider noted that Plaintiff was making slow progress); Tr. 427-  
4 28 (March 2015: Plaintiff's mental status examination showed a depressed and  
5 anxious mood and slowed psychomotor activity; he was extremely depressed and  
6 very anxious, experienced mild panic attacks, had no energy, was unproductive,  
7 was unable to function, and was lonely; Plaintiff was "in a situation where he feels  
8 as if everything is eroding around him," he was unable to "manage his life," he felt  
9 "as if everything [was] falling apart," and he felt incomplete); Tr. 431-32 (October  
10 2015: although the ALJ cited this treatment note to show that Plaintiff continued to  
11 consider and engage in more social activities including biking and competitive  
12 shooting and he used coping mechanisms when his anxiety flared, Plaintiff's  
13 mental status examination at this final visit within the relevant time period  
14 demonstrated slowed psychomotor activity, a flat affect, slow and sparse speech,  
15 and a depressed and anxious mood; Plaintiff's treatment provider noted that "he is  
16 about the same with his mood," his anxiety remained a problem, he was struggling  
17 with sleep, every day was the same for him and he was tired of it, he was frustrated  
18 with himself, he lost his desire and enthusiasm to do things that would bring him  
19 joy, it was a struggle from him to bike and get outside, he was still forcing himself  
20 to exercise and competitively shoot even though it was not giving him relief; he

1 continued to use a technique that he had learned in cognitive therapy to help his  
2 social anxiety, but it was not giving him much help, his progress was adequate, he  
3 had “persistent, chronic anxiety” and required medication and cognitive therapy,  
4 and he would benefit from a short stint of cognitive work to reinforce his ability to  
5 override his social fears.”). The ALJ failed to sufficiently explain why Plaintiff’s  
6 claims were discredited. *Thomas*, 278 F.3d at 958.

7 Even if the ALJ’s conclusion was supported by substantial evidence, the  
8 ALJ’s finding would not be legally sufficient. Because the other reasons the ALJ  
9 identified to discredit Plaintiff’s symptom testimony were not supported by  
10 substantial evidence, the ALJ’s rejection of Plaintiff’s symptom claims would be  
11 based solely on the lack of supporting objective medical evidence, which may not  
12 be the only factor on which an ALJ’s symptom testimony evaluation may be based.  
13 *Rollins*, 261 F.3d at 857; *Bunnell*, 947 F.2d at 346-47; *Fair*, 885 F.2d at 601.

#### 14 2. *Improvement with Treatment*

15 The ALJ found that Plaintiff’s symptom testimony was inconsistent with the  
16 level of improvement he showed with mental health treatment. Tr. 20. The  
17 effectiveness of treatment is a relevant factor in determining the severity of a  
18 claimant’s symptoms. 20 C.F.R. § 404.1529(c)(3); see *Warre v. Comm’r of Soc.*  
19 *Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (conditions effectively controlled  
20 with medication are not disabling for purposes of determining eligibility for



benefits) (internal citations omitted); *see also Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (a favorable response to treatment can undermine a claimant's complaints of debilitating pain or other severe limitations).

Here, the ALJ concluded that Plaintiff's "adequate" progress in mental health therapy indicated that he was capable of functioning within the limitations set forth by the RFC. Tr. 20. The ALJ cited a treatment note from April 2015 where Plaintiff reported improved mood, positive and hopeful feelings, better energy, and he was taking more action. *Id.* (citing Tr. 429). The ALJ noted that Plaintiff retained an anxious mood but otherwise displayed a full affect, good eye contact, logical thought processes and content, and a normal appearance. *Id.* The ALJ indicated that during this April 2015 visit, Plaintiff's treatment provider reported that Plaintiff's progress was "adequate." Tr. 430. However, despite this treatment note, the record does not support sustained improvement in functioning during therapy. *See, e.g.*, Tr. 430 (April 2015: the same treatment note that described Plaintiff's progress as "adequate" also noted that Plaintiff was "[n]ot making at progress socially"; his mental status examination was within normal limits except for an anxious mood); Tr. 431-32 (October 2015: Plaintiff's mental status examination revealed slowed psychomotor activity, a flat affect, slow and sparse speech, and a depressed and anxious mood; Plaintiff's treatment provider noted that "he is about the same with his mood," his anxiety remained a problem,

1 he was struggling with sleep, every day was the same for him and he was tired of  
2 it, he was frustrated with himself, he lost his desire and enthusiasm to do things  
3 that would bring him joy, it was a struggle from him to bike and get outside, he  
4 was still forcing himself to exercise and competitively shoot even though it was not  
5 giving him relief; he continued to use a technique that he had learned in cognitive  
6 therapy to help his social anxiety, but it was not giving him much help, his  
7 progress was once again adequate, he had “persistent, chronic anxiety” and  
8 required medication and cognitive therapy, and he would benefit from a short stint  
9 of cognitive work to reinforce his ability to override his social fears.”); Tr. 435-36  
10 (January 2016: Plaintiff’s mental status examination showed a cooperative and  
11 guarded attitude, tense motor activity, blunted affect, depressed and anxious mood,  
12 normal thought process, attention, and concentration, intact memory, judgment,  
13 abstraction, and cognitive functioning, adequate insight, and mildly impaired  
14 impulse control). Based on this record, improvement with treatment was not a  
15 clear and convincing reason to discredit Plaintiff’s symptom testimony. *Holohan*  
16 *v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001) (The fact that a person suffering  
17 from panic attacks, anxiety, and depression makes some improvement “does not  
18 mean that the person’s impairments no longer seriously affect [his] ability to  
19 function in a workplace.”); *Lester*, 81 F.3d at 833 (“Occasional symptom-free  
20 periods . . . are not inconsistent with disability.”).

1           3. *Inconsistent with Activities*

2           The ALJ found that Plaintiff's activities were inconsistent with the level of  
3 impairment he alleged. Tr. 20. An ALJ may consider a claimant's activities that  
4 undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a  
5 substantial part of the day engaged in pursuits involving the performance of  
6 exertional or nonexertional functions, the ALJ may find these activities  
7 inconsistent with the reported disabling symptoms. *Fair v. Bowen*, 885 F.2d 597,  
8 603 (9th Cir. 1989); *Molina*, 674 F.3d at 1113. "While a claimant need not  
9 vegetate in a dark room in order to be eligible for benefits, the ALJ may discount a  
10 claimant's symptom claims when the claimant reports participation in everyday  
11 activities indicating capacities that are transferable to a work setting" or when  
12 activities "contradict claims of a totally debilitating impairment." *Molina*, 674  
13 F.3d at 1112-13.

14           The ALJ determined that Plaintiff's activities indicated a level of  
15 functioning significantly greater than he alleged. Tr. 20. The ALJ noted that  
16 Plaintiff assisted his father with medical care, made travel arrangements, and  
17 restarted regular exercise and competitive shooting. *Id.* The ALJ found that all of  
18 these activities required forethought, memory, concentration, and at least some  
19 incidental interaction with the general public. *Id.* The ALJ's conclusion is not  
20 supported by substantial evidence. Instead, the record shows that Plaintiff had

1 difficulty with the identified activities. While Plaintiff reported in December 2014  
2 that he had recently been very involved in his father's health care, he also reported  
3 that he needed to run away from everything and have a break. Tr. 423-24.  
4 Although the ALJ cited Plaintiff's ability to make travel arrangements, the  
5 supporting treatment note from February 2015 cited by the ALJ shows that  
6 Plaintiff was driving with his aunt to the Oregon coast and his sister was meeting  
7 them to scatter their mother's ashes. Tr. 426. This treatment note also reported  
8 that the family would be staying in a hotel, however there is no indication that  
9 Plaintiff was making the travel arrangements. *Id.* The ALJ cited a treatment note  
10 from March 2015 to show that Plaintiff had "started to bike and get outside some,"  
11 and "he will start shooting soon," but Plaintiff was extremely depressed and very  
12 anxious, experienced mild panic attacks, had no energy, was unproductive, was  
13 unable to function, and was lonely. Tr. 427-28. A mental status examination from  
14 that visit demonstrated that Plaintiff had a depressed and anxious mood and slowed  
15 psychomotor activity. Tr. 427. At that time, Plaintiff was "in a situation where he  
16 feels as if everything is eroding around him," he was unable to "manage his life,"  
17 he felt "as if everything [was] falling apart," and he felt incomplete. Tr. 428. The  
18 ALJ referenced a treatment note from October 2015 to show that Plaintiff was  
19 biking and competitively shooting, but the cited treatment note also revealed that it  
20 was "a struggle" for Plaintiff to bike and get outside, he was still "forcing himself"

1 to exercise and was competitively shooting “even though it isn’t giving him the  
2 relief.” Tr. 431. This treatment note showed that anxiety remained a problem for  
3 Plaintiff, he was struggling with sleep, every day was the same and he was tired of  
4 it, he was frustrated with himself, he lost his desire and enthusiasm to do things  
5 that would bring him joy, and it did not feel like depression. *Id.* Plaintiff’s mental  
6 status examination from that visit showed slowed psychomotor activity, a flat  
7 affect, slow and sparse speech, and an anxious and depressed mood. *Id.* Further,  
8 Plaintiff testified that exercise was a very important part of his therapy and that  
9 biking was part of his therapy. Tr. 44. He testified that from 2015 until the time of  
10 the hearing, he had cut down on his bicycle exercises because he feared leaving his  
11 house. Tr. 45. Plaintiff testified that there were times when he had difficulty  
12 going to shooting practice or staying for the entire duration, and sometimes he  
13 would just not go to practice. Tr. 49. He testified that because he entered the  
14 shooting competitions as an individual, he would just not show up if he felt that he  
15 was unable to attend. Tr. 51. He also testified that there were occasions when he  
16 started to compete in shooting competitions and then just withdrew completely and  
17 went home. *Id.* Plaintiff testified that he mostly engaged in “mild like  
18 conversations for short periods of time” at the shooting competitions and “then I  
19 just sort of hang back and just sort of spend my time by myself or talking with my  
20 dad.” *Id.* He testified that sometimes he would have a great day at a shooting

1 competition, but sometimes he did “incredibly poorly” because he had no focus or  
2 concentration. Tr. 53. Without further explanation of how the ALJ found  
3 Plaintiff’s activities to be inconsistent with his symptom allegations, this was not a  
4 clear and convincing reason to discredit Plaintiff’s symptom testimony.

5 Overall, the ALJ’s rejection of Plaintiff’s symptom testimony is not  
6 supported by substantial evidence. *Ghanim*, 763 F.3d at 1163. The ALJ is  
7 instructed to reevaluate Plaintiff’s symptom testimony on remand.

#### 8 **B. Lay Opinion Evidence**

9 Plaintiff challenges the ALJ’s rejection of the lay witness statements of his  
10 father, Mr. V.<sup>7</sup> ECF No. 12 at 11-14. An ALJ must consider the statement of lay  
11 witnesses in determining whether a claimant is disabled. *Stout v. Comm’r, Soc.*  
12 *Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006). Lay witness evidence cannot  
13 establish the existence of medically determinable impairments, but lay witness  
14 evidence is “competent evidence” as to “how an impairment affects [a claimant’s]  
15 ability to work.” *Id.*; 20 C.F.R. § 404.1513; *see also Dodrill v. Shalala*, 12 F.3d

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16  
17 <sup>7</sup> As the undersigned identifies plaintiffs in social security cases by only their first  
18 names and the initial of their last names in an effort to protect their privacy, the  
19 undersigned will also identify Plaintiff’s father by the initial of his last name. *See*  
20 LCivR 5.2(c).

1 915, 918-19 (9th Cir. 1993) (“[F]riends and family members in a position to  
2 observe a claimant’s symptoms and daily activities are competent to testify as to  
3 her condition.”). If a lay witness statement is rejected, the ALJ “‘must give  
4 reasons that are germane to each witness.’” *Nguyen v. Chater*, 100 F.3d 1462,  
5 1467 (9th Cir. 1996) (citing *Dodrill*, 12 F.3d at 919).

6 The ALJ considered a third-party function report dated May 31, 2016 from  
7 Mr. V. and assigned little weight to his statements. Tr. 21, 229-37. Mr. V.  
8 reported that Plaintiff could not handle “the normal stresses of dealing with  
9 people.” Tr. 229. He stated that Plaintiff had recently cancelled a flight because  
10 he could not deal with the normal rush, crowds, and pressures of flying. *Id.* Mr.  
11 V. reported that Plaintiff would often tell him he had “great difficulty” sleeping.  
12 Tr. 230. He stated that although Plaintiff was physically able to do yard work, he  
13 had emotional and intellectual difficulty dealing with yard work. Tr. 231-32. Mr.  
14 V. reported that Plaintiff was able to drive a car, ride a bicycle, go out alone, and  
15 shop in stores for groceries and basic clothing. *Id.* He noted that Plaintiff spent  
16 very little time with others and “seem[ed] to relate well to other bicyclists.” Tr.  
17 233. Mr. V. reported that Plaintiff’s speech slurred, and he indicated that  
18 Plaintiff’s impairments affected his ability to talk, remember, complete tasks, and  
19 concentrate. Tr. 234. The ALJ was required to give germane reasons to discredit  
20 this lay witness opinion. *Nguyen*, 100 F.3d at 1467.

1       The ALJ discounted Mr. V.'s opinion because his statements were  
2 inconsistent with the medical evidence of record. Tr. 21. Inconsistency with the  
3 medical evidence is a germane reason for rejecting lay witness testimony. *See*  
4 *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005); *Lewis v. Apfel*, 236 F.3d  
5 503, 511-12 (9th Cir. 2001) (germane reasons include inconsistency with medical  
6 evidence, activities, and reports). However, the ALJ determined that Mr. V.'s  
7 statements were inconsistent with the medical evidence cited by the ALJ in the  
8 decision, and as discussed *supra*, some of the evidence the ALJ identified could  
9 reasonably support Plaintiff's disability allegations. Tr. 21. The ALJ failed to  
10 identify what medical evidence was inconsistent with the limitations Mr. V.  
11 opined. *Id.* Therefore, the ALJ failed to provide germane reasons to discredit Mr.  
12 V.'s testimony. The ALJ is instructed to reconsider the lay opinion evidence on  
13 remand.

#### 14       **C. Other Challenges**

15       Plaintiff raises challenges to the ALJ's analyses at step three and step five.  
16 ECF No. 12 at 9-11, 19-20. However, because this case is remanded for the ALJ  
17 to properly consider Plaintiff's symptom claims and the lay opinion evidence, the  
18 Court declines to address Plaintiff's other challenge here. On remand, the ALJ is  
19 instructed to reevaluate Plaintiff's symptom claims and the lay witness statements  
20



1 of Plaintiff's father, elicit testimony from a medical expert, and conduct a new  
2 sequential analysis.

3 **D. Remedy**

4 Plaintiff urges this Court to remand for an immediate award of benefits.  
5 ECF No. 12 at 9, 11, 14, 19-20; ECF No. 15 at 1, 4, 9-10. "The decision whether  
6 to remand a case for additional evidence, or simply to award benefits is within the  
7 discretion of the court." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)  
8 (citing *Stone v. Heckler*, 761 F.2d 530, 533 (9th Cir. 1985)). When the Court  
9 reverses an ALJ's decision for error, the Court "ordinarily must remand to the  
10 agency for further proceedings." *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir.  
11 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) ("[T]he proper  
12 course, except in rare circumstances, is to remand to the agency for additional  
13 investigation or explanation"); *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d  
14 1090, 1099 (9th Cir. 2014). However, in a number of Social Security cases, the  
15 Ninth Circuit has "stated or implied that it would be an abuse of discretion for a  
16 district court not to remand for an award of benefits" when three conditions are  
17 met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the credit-as-true rule,  
18 where (1) the record has been fully developed and further administrative  
19 proceedings would serve no useful purpose; (2) the ALJ has failed to provide  
20 legally sufficient reasons for rejecting evidence, whether claimant testimony or

1 medical opinion; and (3) if the improperly discredited evidence were credited as  
2 true, the ALJ would be required to find the claimant disabled on remand, the Court  
3 will remand for an award of benefits. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th  
4 Cir. 2017). Even where the three prongs have been satisfied, the Court will not  
5 remand for immediate payment of benefits if “the record as a whole creates serious  
6 doubt that a claimant is, in fact, disabled.” *Garrison*, 759 F.3d at 1021.

7 Here, it is not clear from the record that the ALJ would be required to find  
8 Plaintiff disabled if all the evidence were properly evaluated. Specifically, it is not  
9 clear what RFC limitations the ALJ would determine to be applicable if he were to  
10 fully credit Plaintiff’s symptom claims and the lay opinion evidence of Plaintiff’s  
11 father. Further proceedings are necessary for the ALJ to reconsider Plaintiff’s  
12 symptom claims and the lay opinion evidence. On remand, the ALJ should  
13 reconsider Plaintiff’s symptom claims and the lay opinion evidence, elicit  
14 testimony from a medical expert, and conduct a new sequential analysis.

### 15 CONCLUSION

16 Having reviewed the record and the ALJ’s findings, the Court concludes the  
17 ALJ’s decision is not supported by substantial evidence and free of harmful legal  
18 error. Accordingly, **IT IS HEREBY ORDERED:**

19 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 12**, is **GRANTED**.

20 2. Defendant’s Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

1           3. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff  
2 REVERSING and REMANDING the matter to the Commissioner of Social  
3 Security for further proceedings consistent with this recommendation pursuant to  
4 sentence four of 42 U.S.C. § 405(g).

5           The District Court Executive is directed to file this Order, provide copies to  
6 counsel, and **CLOSE THE FILE**.

7           DATED August 7, 2020.

8                               s/Mary K. Dimke  
9                               MARY K. DIMKE  
10                              UNITED STATES MAGISTRATE JUDGE